

EXHIBIT K

R.C.A.
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STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Arbitrator:

Paul Olson

In the Matter of the Petition by GCI)
COMMUNICATIONS CORP. d/b/a GENERAL)
COMMUNICATION, INC. and GCI for)
Arbitration Under Section 252 of the Communications)
Act of 1996 with the MUNICIPALITY OF)
ANCHORAGE d/b/a ATU TELECOMMUNICATIONS)
a/k/a ATU TELECOMMUNICATIONS for the)
Purpose of Instituting Local Competition.)

U-96-89

**RECIPROCITY: THE OBLIGATIONS SET FORTH
IN SECTION 251(c) DO NOT APPLY TO GCI.**

There is no merit to ACS's contention that this Commission should apply the obligations delineated in Section 251(c) and the Interconnection Agreement being arbitrated herein to GCI. The fact that ACS wishes to limit its obligations to those absolutely required is expressed in its proposed addition to the first Section of the Agreement: "The Parties intend to establish and limit the application of such rights and obligations to those ACS is required by law to provide."¹ On its face, Section 251(c) obligations do not apply to GCI because it is not an "incumbent local exchange carrier" as defined under Section 251(h)(1) of the

¹ While ACS has also gratuitously proposed a new reference to its retail resale obligations under Sec. 251(b), the objectionable language throughout the proposed Interconnection Agreement imposing parity as to Section 251(c) obligations is the subject of this dispute.

U-96-89; RECIPROCITY: THE OBLIGATIONS SET FORTH IN SECTION 251(c)
DO NOT APPLY TO GCI.

May 13, 2003

Page 1 of 8

1 Act. Furthermore, the FCC has issued both an order² and a rule³ explicitly
2 forbidding state commissions from imposing Section 251(c) obligations on CLECs.
3 The order and rule further clarify that the FCC – and only the FCC – has the
4 authority to grant requests to treat a CLEC as an ILEC for purposes of Section 251.
5 The FCC's rules are consistent with the Supreme Court's understanding of the
6 purposes of the 1996 Act – which, the Court explained, was enacted “on the
7 understanding that incumbent monopolists and contending competitors are
8 unequal,” citing “§ 251(c) ('Additional obligations of incumbent local exchange
9 carriers').”⁴ In any event, the wisdom of the FCC rules are not subject to challenge
10 in this proceeding. In view of the FCC's well-settled authority to promulgate rules
11 implementing Section 251, this Commission must reject ACS's proposal to impose
12 the Section 251(c) obligations on GCI.
13
14

15 **A. The FCC Has Concluded That Section 251(c) Obligations**
16 **May Not Be Applied To Competitive Local Exchange**
17 **Carriers In Arbitration Proceedings.**

18 The obligations set forth in Section 251(c) apply to “incumbent local
19 exchange carriers” and GCI is not an ILEC.⁵ On its face, therefore, the obligations
20

21 ² *Implementation of the Local Competition Provisions in the Telecommunications Act*, First Report and
22 Order, CC Docket No. 96-98 and 95-185, 11 FCC Red. 15499, 15518, 16109 (1996).

23 ³ 47 C.F.R. § 51.223.

24 ⁴ *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 533 (2002).

25 ⁵ “Incumbent local exchange carrier” is defined in Section 251(h)(1) as :

26 ... with respect to an area, the local exchange carrier that –

27 (A) on February 8, 1996, provided telephone exchange service in such area; and

(B) (i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

1 in Section 251(c) do not apply to GCI. In addition, in the *First Report and Order*
2 implementing the 1996 Act, the FCC concluded that "allowing states to impose on
3 non-incumbent LECs obligations that the 1996 Act designates as 'Additional
4 Obligations of Incumbent Local Exchange Carriers,' distinct from obligations on all
5 LECs, would be inconsistent with the statute."⁶ The FCC then issued a rule,
6 codified as 47 C.F.R. § 51.233(a), formalizing this conclusion:
7

8 A State may not impose the obligations set forth in section
9 251(c) of the Act on a LEC that is not classified as an
10 incumbent LEC as defined in section 251(h)(1) of the Act,
11 unless the Commission issues an order declaring that such
12 LECs or classes or categories of LECs should be treated as
13 incumbent LECs.

14 Although state commissions are precluded from imposing Section
15 251(c) obligations on CLECs, the Act established a process by which those
16 obligations may be extended to CLECs. Specifically, Section 251(h)(2) provides
17 that the FCC "may, by rule, provide for the treatment of a local exchange carrier (or
18 class or category thereof) as an incumbent local exchange carrier for purposes of
19 this section" if certain requirements are met.⁷ In the *First Report and Order* the
20 FCC stated that it "anticipate[s] that we will not impose incumbent LEC obligations

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign
of a member described in clause (i).

21 ⁶ First Report and Order, *supra* note 2, at 16109.

22 ⁷ Those requirements are:

- 23 (A) such carrier occupies a position in the market for telephone exchange service within an
24 area that is comparable to the position occupied by a carrier described in paragraph (1);
25 (B) such carrier has substantially replaced an incumbent local exchange carrier described in
26 paragraph (1); and
27 (C) such treatment is consistent with the public interest, convenience, and necessity and the
purposes of this section.

1 on non-incumbent LECs absent a clear and convincing showing that the LEC
2 occupies a position in the telephone exchange market comparable to the position
3 held by an incumbent LEC, has substantially replaced an incumbent LEC, and that
4 such treatment would serve the public interest, convenience, and necessity and the
5 purposes of section 251."⁸

6
7 However, the FCC provided a process implementing Section 251(h)(2)
8 by adopting 47 C.F.R. § 51.223(b), which provides:

9 A state commission, or any other interested party, may
10 request that the Commission issue an order declaring that a
11 particular LEC be treated as an incumbent LEC, or that a
12 class or category of LECs be treated as incumbent LECs,
13 pursuant to section 251(h)(2) of the Act.

14 Clearly, an arbitration proceeding is not the proper forum for
15 entertaining ACS's petition to bring GCI within the scope of Section 251(c). ACS
16 must instead submit its request directly to the FCC as required by Section 251(h)(2)
17 of the Act, the *First Report and Order*, and Section 51.233(b) of the FCC's rules.
18 Because the criteria in the Act and the FCC rule plainly have not been met, such a
19 request is unlikely to succeed at the FCC, but that is where the request must be
20 made.

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25 ⁸ *First Report and Order*, *supra* note 2, at 16110.

B. The FCC's Rule That The Obligations Imposed By Section 251(c) Do Not Apply To Competitive Local Exchange Carriers Is Not Subject To Challenge In This Proceeding.

In its *Verizon* decision, the Supreme Court explained why Congress imposed more extensive obligations on incumbents than competitors. After reviewing the advantages of the companies that held a monopoly in their markets on local exchange service prior to the enactment of the 1996 Act, the Court said that "[i]t is easy to see why a company that owns a local exchange (what the Act calls an 'incumbent local exchange carrier,' 47 U.S.C. § 251(h)), would have an almost insurmountable competitive advantage."⁹ In light of the advantages the incumbents derived from decades of existence as protected monopolies, the Court concluded, the scheme of the Act is "to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property."¹⁰ Thus, there is a sound reason for the FCC to have concluded that the additional obligations Congress imposed on ILECs should not normally be applied to CLECs.

In any event, this is not the forum to challenge the FCC's rules. The FCC's authority to issue binding rules implementing the 1996 Act was subject to extensive litigation, of course, and in *AT&T Corp. v. Iowa Utilities Board* the Supreme Court concluded that "The FCC has rulemaking authority to carry out the 'provisions of [the Communications Act of 1934],' which include §§ 251 and 252,

⁹ *Verizon*, 535 U.S. at 490.

1 added by the Telecommunications Act of 1996."¹¹ The statute makes clear in
2 Section 252(c)(1) that state commissions arbitrating interconnection agreements
3 must make sure those agreements "meet the requirements of section 251, including
4 the regulations prescribed by the" FCC. State commissions are not authorized to
5 ignore or overrule those regulations.

6
7 In *MCI Telecommunication Corp. v. Bell Atlantic Pennsylvania*, the
8 Third Circuit accordingly held that interconnection agreements "must comply with
9 the Act and with FCC regulations; if the approved agreement, containing the state
10 commission's interpretations of the law, conflicts with the legal interpretations in
11 the FCC regulations, the FCC interpretation must control under the Supremacy
12 Clause and under the plain language of the Act."¹² Similarly, the Sixth Circuit
13 stated: "Of course, we consider the FCC's interpretation of the Act persuasive
14 authority because Congress authorized the FCC to issue rules 'to implement the
15 requirements' of § 251."¹³

16
17 Federal courts addressing the question of whether state commissions
18 may impose Section 251(c) obligations on CLECs have also affirmed that the FCC
19 has exclusive authority over that issue. In *U.S. West Communication, Inc. v.*
20

21
22 ¹⁰ *Id.* at 489.

23 ¹¹ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 (1999). The majority opinion went on to state
24 that "the question in these cases is not whether the Federal Government has taken the regulation of local
25 telecommunications competition away from the States. With regard to the matters addressed by the 1996
26 Act, it unquestionably has." *Id.* n. 6.

27 ¹² 271 F.3d 491, 516 (3rd Cir. 2001).

¹³ *Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580, 586 (6th Cir. 2002)

1 *Jennings*, for example, a district court overturned the Arizona Corporation
2 Commission's decision to require CLECs to unbundle network elements – a Section
3 251(c) requirement.¹⁴ In that case, decided before the Supreme Court in *Verizon*
4 explained that Congress very clearly intended to treat CLECs differently than
5 ILECs, the court expressed doubts as to the merits of the FCC's rule stating that the
6 obligations of Section 251(c)(3) normally should not be extended to CLECs, but
7 recognized that it must apply the rule because, "Under the Hobbs Act, 28 U.S.C. §
8 2342, the FCC's regulation may be challenged only in the Court of Appeals."¹⁵ In
9 like vein, the district court of Connecticut stated in *MCI Telecommunications Corp.*
10 *v. Southern New England Telephone Co.*¹⁶ that the issue of whether it would be
11 appropriate to treat a CLEC as an ILEC under Section 251(h)(2) is "one that the
12 1996 Act explicitly places within the jurisdiction of the FCC."¹⁷

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15 In short, should ACS wish to challenge the FCC's regulation prohibiting
16 states from imposing Section 251(c) obligations on CLECs, its only recourse is to
17 ask the FCC to change its rules and, if the FCC declines, challenge that decision in a
18 federal appellate court pursuant to the Hobbs Act, 28 U.S.C. § 2342(1).¹⁸ But as the

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21 ¹⁴ *U.S. West Communication, Inc. v. Jennings*, 46 F. Supp.2d 1004 (Ariz. 1999).

22 ¹⁵ *Id.* at 1020.

23 ¹⁶ *MCI Telecommunications Corp. v. Southern New England Telephone Co.*, 27 F.Supp.2d 326, 327 (Conn. 1998).

24 ¹⁷ *Id.* at 337.

25 ¹⁸ 28 U.S.C. § 2342, which provides that:

26 The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has
27 exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the
validity of -

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1 Supreme Court explained in *Verizon*, under the 1996 Act Congress deliberately and
2 with good reason imposed certain obligations on the incumbent monopolists and not
3 on competitors. Alternatively, as discussed previously, ACS could ask the FCC to
4 classify GCI as an ILEC under Section 251(h), even though that request also would
5 lack merit.

6
7 In any event, ACS' proposal that GCI be treated like an ILEC to the
8 extent that Section 251(c) obligations be made reciprocal in the proposed
9 Interconnection Agreement is utterly without merit.

10 Dated May 13, 2003 at Anchorage, Alaska.

11 Respectfully submitted,

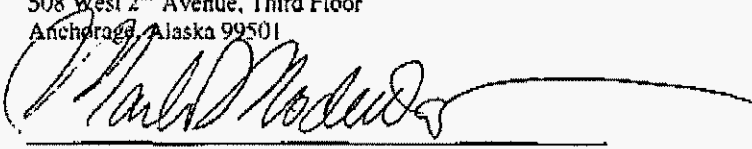
12 GCI COMMUNICATION CORP.

13 By 
14

15 **CERTIFICATE OF SERVICE**

16 I certify that on this 13 day of May 2003,
17 a copy of the foregoing was served via e-mail
18 and hand delivery on the following:

19 Paul Olson, Hearing Officer
20 Regulatory Commission of Alaska
21 701 W. Eighth Ave., Suite 300
22 Anchorage, Alaska 99501

23 David Shoup
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27 

Mark Moderow

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

U-96-89; RECIPROCITY: THE OBLIGATIONS SET FORTH IN SECTION 251(c)
DO NOT APPLY TO GCI.

May 13, 2003

Page 8 of 8

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1 STATE OF ALASKA

2 THE REGULATORY COMMISSION OF ALASKA

3 Before Commissioners:

Mark K. Johnson, Chair
Kate Giard
Dave Harbour
James S. Strandberg
G. Nanette Thompson

7 In the Matter of the Petition by GCI
8 COMMUNICATIONS CORP. d/b/a GENERAL
9 COMMUNICATION, INC., and d/b/a GCI for
10 Arbitration under Section 252 of the
11 Telecommunications Act of 1996 with the
12 MUNICIPALITY OF ANCHORAGE d/b/a
ANCHORAGE TELEPHONE UTILITY a/k/a ATU
TELECOMMUNICATIONS for the Purpose of
Instituting Local Exchange Competition

U-96-89

ORDER NO. 42

13 ORDER SETTING PRICES FOR ACCESS TO UNBUNDLED NETWORK
14 ELEMENTS, RESALE AND TERMS AND CONDITIONS OF
15 INTERCONNECTION

16 BY THE COMMISSION:

U-96-89(42) TABLE OF CONTENTS

1	I. Summary.....	1
2	II. Background.....	1
3	III. Loop Prices.....	5
4	A. Structural Changes – Demand and Network Design	6
5	B. Loop Model Inputs	8
6	1. Depreciation	9
7	2. Cost of Capital	13
8	a) Capital Structure.....	16
9	b) Cost of Debt.....	18
10	c) Cost of Equity	20
11	(i) Risk Free Rate.....	22
12	(ii) Beta	23
13	(iii) Risk Premium	24
14	(iv) Size Premium Adjustment	24
15	3. Materials Database.....	27
16	a) Cable	28
17	b) Drop and SAI Terminals	30
18	c) Poles.....	30
19	d) Road Prism Construction.....	31
20	e) Feeder Trenching	32
21	f) Road Crossing	38
22	g) Driveway Crossing.....	38
23	h) Manholes.....	39
24	i) Vaults.....	39
25	j) Handholes	40
26	k) Drop Feet.....	40
	l) Underground Conduit	41
	m) Other Inputs.....	41
	4. Loop Inputs - Maintenance Factors	43
	5. Loop Inputs - Common Support.....	45
	6. Loop Inputs - General Support Facilities (GSF)	47
	IV. Switching, Transport and Signaling.....	49
	V. Collocation and Orphan Elements.....	51
	VI. Non-recurring Charges.....	52
	VII. Wholesale Rates.....	54
	VIII. Contract Issues	59
	A. Term of Agreement.....	61
	B. Reciprocity of Obligations	62
	C. Rates and Charges.....	62
	D. Dispute Resolution Procedures	63
	E. Notice of Changes to the Network, Procedures and Resold Services	64
	F. Operational Support Systems (OSS)	66
	G. Performance Standards.....	67
	H. Resale Part C Attachment II	69
	I. Unbundled Network Elements Part C Attachment III	69
	J. Interconnection and Operational Requirements Part C Attachment IV	73
	K. Collocation Part C Attachment V	74
	L. Rights of Way Part C Attachment VII	75

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2	X.
3	M. Miscellaneous Provisions
4	Conclusion
5	Order
6	
7	
8	
9	
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1 dealing. We find these ethical and legal obligations adequate and require that the
2 provisions addressing these behaviors be omitted from the final contract version.

3 B. Reciprocity of Obligations

4 ACS-AN proposed contract language to make obligations under the
5 contract reciprocal for ACS-AN and GCI. Reciprocal obligations to provide unbundled
6 network elements to ACS-AN are not germane to this docket. The purpose of this
7 proceeding is to address the obligations of the incumbent local exchange carrier,
8 ACS-AN, under Section 251(c) of the Act. This docket is not the forum for consideration
9 of GCI's status as a CLEC or an ILEC and its obligations in the market. We require the
10 Parties to remove language related to reciprocal GCI obligations to ACS-AN.

11 C. Rates and Charges

12 Rates for services rendered under the contract are listed in Part C
13 Attachment II. Charges for services not included in Attachment II must be negotiated by
14 the parties and incorporated into the contract. The contract should not contain
15 provisions that allow ACS-AN to default to use of retail tariff rates when an
16 unanticipated service is required by GCI. We reject ACS-AN's proposed provision in
17 Part A section 1.1 as inconsistent with TELRIC standards that require a forward-looking
18 cost analysis. Retail tariff rates are set using embedded costs. Disputes regarding the
19 services included for particular charges should be resolved using the dispute resolution
20 procedures in the contract.

21 Work orders for overtime hours worked should be scheduled anonymously
22 so that overtime charges are not incurred by one party or the other in a discriminatory
23 manner. We adopted ACS-AN's model for nonrecurring charges; accordingly, any
24 contract language regarding cost elements included in these charges must be
25 consistent with that model. ACS-AN suggests that billing procedures have been
26